APPEAL NO. 93084

This appeal arises under the Texas Workers' Compensation Act of 1989 (1989 Act), TEX. REV. CIV. STAT. ANN. arts. 1.01 through 11.10 (Vernon Supp 1993). On January 5, 1993, a contested case hearing was held in (city), Texas, with (hearing officer) presiding. She determined that appellant's (claimant herein) compensable accident of (date of injury), while affecting his low back, knee, and ankle, did not injure his neck. Claimant asserts that the hearing officer erred in not admitting into evidence respondent's (carrier herein) pleading in intervention in claimant's suit for gross negligence against a company contracting with his employer. Claimant also stated that the overwhelming evidence indicated that claimant injured his neck on (date of injury). Carrier replied that the evidence was sufficient to support the hearing officer and that the pleading in intervention did not clearly admit a neck injury; in addition, it would not qualify as a judicial admission.

DECISION

Finding that the evidence is sufficient to support the decision, we affirm.

Claimant had worked for his employer for five years when he fell approximately 12 feet when he stepped on a pipe when descending a ladder on (date of injury). He landed on his lower back and leg. After going home, he went to an emergency room, where he complained of his low back, knee and ankle. The emergency room report says there were no other complaints.

Claimant's injury to the low back, knee and ankle was not disputed. The carrier does contest whether any neck injury was caused by the fall in May 1991. While there was no notice question per se, the carrier contended at the hearing that claimant would have complained earlier than September 5, 1991 if there had been a neck injury. Claimant countered by stating that he did tell his doctors of the neck injury, which either was noted right away or within a few weeks of the accident, but they failed to record it.

Claimant was seen by Dr. N) of an Occupational and Family Medicine Clinic on May 8, 10, 14, 15, 16, 17, 20, 21, 22, 23, 24, 28, 30, and June 11, 1991. Claimant complained of low back, knee, and ankle pain upon his first visit and thereafter, except as noted. During that period, Dr. N did not note that claimant mentioned any type of neck region pain or problem. Dr. N did note on the third visit that claimant started to complain of testicular pain. On the ninth visit, Dr. N dropped his reference to the testicular pain, and on the last visit, June 11th, he does not refer to the ankle pain anymore. Also on June 11, 1991, Dr. N refers to claimant's first visit to (Dr. R) to whom Dr. N had referred claimant.

Dr. R is a neurosurgeon who saw claimant on June 10 and June 27, 1991. He then was seen again by claimant on June 22, 1992. His record of claimant's physical examination shows that he did not simply check claimant's low back and leg; it contains his comment that there were no bruits in the neck of claimant. (The doctor heard no abnormal sounds when checking the neck.) He ordered a CT scan and on June 27th noted that it

showed a mild diffuse disc bulge at L4-S1 but also said the myelogram was within normal limits. On June 22, 1992, Dr. R said that the claimant had seen (Dr. S) and then commented that the claimant "states that he told me about some headaches and pain in his neck when I saw him, but I do not have any record of that in my records." Dr. R did not think claimant needed surgery either of the neck or low back.

Claimant had seen (Dr. Ru), on May 15, 1991. (This visit was marked only by a short entry by Dr. Ru.) Dr. Ru's more lengthy note was made on claimant's second visit on July 1, 1991. In 1991 Dr. Ru does not mention "neck" or any related description of that area of the body in either visit. He refers to the low back, buttock, and thigh as having pain and numbness and mentions a loss of sex function or desire. A history completed for Dr. Ru shows several "boxes" checked in an area describing the low back, several boxes checked in an area describing the hips, legs and feet, but no "boxes" were checked in an area describing the neck. Under the neck area were "boxes" for "stiff neck," "neck pain with movement," "pain in the neck," and "popping sounds in neck." (In 1987 claimant had seen Dr. Ru on several visits after being in a car wreck in which the claimant listed his neck as a major area of complaint.)

Claimant began seeing Dr. S in July of 1991, and Dr. S first notes claimant complaining about his neck on September 5, 1991. On March 18, 1992 Dr. S states that "[p]atient is a candidate for cervical fusion and possible lumbar laminectomy." A neurosurgeon, (Dr. B), reviewed the medical records of claimant on March 12 and July 15, 1992. In the subsequent review, Dr. B said, "[i]t grieves me greatly to see the repeat of this pattern of care and/or lack thereof on this gentleman. Characteristics of treating, overtreating, treating improperly and prolonging the patient's recovery by repeat testing, treatment, etc., is a frequent pattern. The physician involved has a long history of lining these people up for this type of `care'."

Claimant testified that he had a hard time making people understand him, but said he did tell his doctors of the neck pain and headaches--except he said that he did not tell Dr. Ru about his neck; he also said that he only saw Dr. Ru once in 1991. Claimant also opined that he may have used the word "clerical" instead of "cervical" and confused his doctors. The hearing officer is the sole judge of the weight and credibility of the evidence. *See* Article 8308-6.34(e) of the 1989 Act. She could question claimant's credibility, when he said he repeatedly told his doctors of his neck pain to no avail, from his ability to communicate a testicular problem a week after the accident to his doctor and his use of the word "neck" in describing a problem to Dr. Ru in 1987. She also could infer that at least one of three doctors, other than Dr. Ru, would question claimant about his neck and record his observation if told of a "clerical" injury or pain. As an interested witness, claimant's testimony about his injury was not required to be accepted. *See* Presley v. Royal Indem. Ins. Co., 557 S.W.2d 611 (Tex. Civ. App.-Texarkana 1977, no writ). The hearing officer could believe some of claimant's testimony about the accident and not believe that he injured

his neck at that time. *See* Ashcraft v. United Supermarkets, Inc., 758 S.W.2d 375 (Tex. App.-Amarillo 1988, writ denied). The hearing officer could draw reasonable inferences concerning inquiries claimant's doctors would have made had claimant used the word "clerical" in describing his symptoms to them. *See* Harrison v. Harrison, 597 S.W.2d 477 (Tex. Civ. App.-Tyler 1980, writ ref'd n.r.e.).

The Appeals Panel has previously affirmed hearing officers who questioned the causation of a particular injury which was not recorded by any doctor for an extended period of time. *See* Texas Workers' Compensation Commission Appeal No. 92326, decided August 28, 1992, and Texas Workers' Compensation Commission Appeal No. 92617, decided January 14, 1993. The four months without recorded complaint falls between the lengths of delay reported in the two cited cases. Considering the credibility questions claimant presented to the hearing officer pertaining to his allegations that at least three doctors failed to record any neck injury for four months, the evidence sufficiently supports the finding of fact that claimant did not injure his neck on the job.

The claimant also asserts that the hearing officer should have allowed evidence of carrier's pleadings in a lawsuit by claimant against the company with whom his employer was under contract. Gevinson v. Manhattan Const. Co. of OK., 449 S.W.2d 458 (Tex. 1969) looked at a question of judicial admission on the part of the appellant. The court said that it is essential that the statement be clear and unequivocal; it added also "it is important to consider whether the statement relates to facts peculiarly within the declarant's own knowledge or is simply his impression of a transaction or an event as a participant or an observer . . ." While Lillie Sales, Inc. v. Rieger, 437 S.W.2d 872 (Tex. Civ. App.-Texarkana 1969, writ ref'd n.r.e.) said that a party's voluntary admissions in one judicial proceeding are generally admissible against him in another judicial proceeding in which he is a party, Forest Lane Porshe-Audi Inc. v. Staten, 638 S.W.2d 62 (Tex. App.-Dallas 1982, no writ) stated that since appellant's third party action was only in indemnity, its pleadings were not judicial admissions (of a defective painting) and would not support summary judgment in the present suit. It reversed and remanded. Finally, Houston First American Sav. v. Musick, 650 S.W.2d 764 (Tex. 1983) said "[t]he party relying on his opponent's pleadings as judicial admissions of fact, however, must protect his record by objecting to the introduction of evidence contrary to that admission of fact and by objecting to the submission of any issue bearing on the fact admitted."

The claimant at the hearing did not characterize his offer as a judicial admission. Claimant appeared to have offered the pleadings as admissions against interest. Arguably, the pleadings were relevant for admission even though they recited that they adopted the petitions in question only "insofar as they allege a cause of action." Had they been admitted the hearing officer would have been free to assign whatever weight she considered appropriate to them, not unlike an offering of evidence that claimant had sought unemployment compensation and asserted his wellness for work in so doing. In this

instance, the medical records together with the testimony of the claimant were sufficient to overcome any consideration of the pleadings as in admission against interest so the failure to accept did not alter the outcome of the hearing, and an improper decision was not rendered. Any error is nonreversible error. *See* Hernandez v. Hernandez, 611 S.W.2d 732 (Tex. App.- San Antonio 1981, no writ.).

The decision and order of the hearing officer are affirmed.

Joe Sebesta
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Lynda H. Nesenholtz
Appeals Judge